INTRODUCTION

Respondent hereby replies to the Amici filed by four organizations, The Protection and Advocacy, Inc. (P&R), the American Association of Mentally Retarded (AAMR), the California Attorneys for Criminal Justice (CACJ), and the Habeas Resource Center (HRC). The question is whether the petition presents a case to consider Anderson Hawthorne as being a person described by *Atkins v. Virginia* (2002) 536 U.S. 304, such that there would be a "national consensus" that, because of mental retardation, it would be cruel and unusual, under the Eighth Amendment of the United States Constitution, to impose the death penalty upon him. In its return to the order to show cause, respondent averred that the petition instead demonstrated that petitioner was *not* such a person.

It must be remembered that *Atkins* contains the language that,

> Not all people who claim to be mentally retarded will be so impaired as to fall *within the range of mentally retarded offenders about whom there is a national consensus*. As was our approach in *Ford v. Wainwright*, with regard to insanity, 'we leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.' [citation.]

(*Id.* at 317.)

Besides insanity, other prohibitions on executions for Eighth Amendment reasons, such as age, have an inflexible dividing line. With insanity, as with mental retardation, there are degrees. A "consensus" is achieved in that area by the use of a forensic test, e.g., ability to distinguish right from wrong, which is a measuring stick to which all contenders are examined. Unlike what is urged by *Amici* here, the courts do not simply surrender the entire question to doctors and medical experts but the fact-finder has a forensic definition as a guide.

This Court has the inherent power to interpret a statute so that it avoids invalidation on grounds of unconstitutionality.[1] Respondent here, as it did in its Return and Informal Response, urges that this Court interpret Penal Code section 1376 as containing two "brightline" rules. First, that "significant" sub-average intelligence be interpreted as, at least, an intelligent quotient of 70 or below. Respondent argues that by interpreting the Penal Code section in this manner, this interpretation will control present and future trials as well as post-conviction cases, as such there will be no inconsistency. Secondly, respondent urges this Court to also adopt a forensic test, such as was contained in *In re Ramon M.* (1978) 22 Cal. 3d 419, 428 ["that defendant's mental retardation constitutes a defense to criminal conduct if 'at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.'"].

Thus, this Court should interpret Penal Code section 1376(a) to define mentally retarded as "the condition of significantly subaverage general intellectual function, as evidenced by an Intelligent Quotient score of 70 or less, existing concurrently with deficits in adaptive behavior and manifested before the age of 18 wherein the trier of fact finds that as a result of such affliction, the defendant lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."

Respondent deems its requests in this regard as necessary to protect the statute from future invalidation on the grounds that its uncertainty as to what should be a fixed status denies equal protection to capital defendants claiming mental retardation standard, much in the same way as the United States Supreme Court ruled that Florida's patchwork system of counting spoiled ballots denied equal protection to voters who had not cast spoiled ballots in *Bush v. Gore*

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[1] As was stated in *Kopp v. Fair Political Practices Commission* (1995) 11 Cal. 4th 607, 641.

> Our own cases reveal that, consistently with *Welsh*, *supra*, and its numerous high court predecessors and progeny, it is appropriate in some situations for courts to reform--i.e., "rewrite"--enactments in order to avoid constitutional infirmity, when doing so "is more consistent with legislative intent than the result that would attend outright invalidation." (*Arp v. Workers' Comp. Appeals Bd.* (1977) 19 Cal. 3d 395, 407-408 [138 Cal. Rptr. 293, 563 P.2d 849] (*Arp*).) As explained below, like the high court, we have reformed statutes to preserve their constitutionality in cases concerning classifications otherwise invalid under the equal protection clause, and in cases involving criminal statutes otherwise unconstitutionally vague or overbroad. In addition, our decisions have reformed statutes to confer necessary procedural due process protections, to avoid classifications impermissible under the First Amendment, and to avoid nullification under the judicial powers provision of our own Constitution.

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(2000) 531 U.S. 98, 105-108, 121 S. Ct. 525, 148 L. Ed. 2d 388 [The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right. Florida's basic command for the count of legally cast votes is to consider the "intent of the voter." *Gore v. Harris*, 779 So. 2d at 270 (slip op., at 39). This is unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary.].

Of note, even in this very Petition, Petitioner, in part II, (Petn. at pp. 6-8) argues that even if he is not "mentally retarded," his condition is, for equal protection purposes, the equivalency of being mentally retarded thus rendering it a violation of that protection to execute him. Regardless of the merits of that argument, which is not addressed in the Order to Show Cause, it is certainly foreseeable that given the demands of Petitioner and the *Amici Curiae* for a non-specific, ephemeral, ethereal, and non-substantive definition, that should no firm fixed line be established, the statute would be open to attack by future unsuccessful claimants on grounds that it denies them equal protection.

In fact, of the 37 states that have the death penalty, ten states (Arizona, Arkansas, Idaho, Kentucky, Maryland, Nebraska, New Mexico, North Carolina, Tennessee, and Washington) have statutes that specifically define "significant subaverage" as an I.Q. of 70 or below, with the number being 65 in Arkansas. Pennsylvania has a bill in the legislature to this effect. Alabama (*Ex Parte Smith*, 2003 Ala. Lexis 79 (Ala. Mar. 14, 2003)), Indiana (*Williams v. State* (2003) 793 N.E. 2d 1019, 1027-1028, 2003 Ind. Lexis 614), Mississippi (*Wiley v. State* (2004) 2004 Miss. LEXIS 1096 (Miss. Aug. 26, 2004)), Ohio (*State v. Lott* (2004) 97 Ohio St. 303, 305, 779 N.E. 2d 1011, 1014), and Texas (*Howard v. State* (2004) 2004 Tex. Crim. App. LEXIS 1729(Tex. Crim. App. Oct. 13, 2004)) have judicially determined that for the purposes of *Atkins* challenges, the litigant must have an I.Q. of 70 or lower.

Next, the states of Connecticut, Florida, and Virginia specifically require that on an I.Q. test, the defendant score at least "two standard deviations below the mean." Although this is not the test that Respondent suggests, it is, at least, a fixed guideline.

Additionally, different types of objective guarantees are written in other statutes regarding this question post-*Atkins*. *In re Ramon M*. type statutes are in effect in three other states. Kansas requires that the deficit be "to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of the law." (Kans.Stat. Ann. 21-4623(e).) Oklahoma adopted a definition of "significant subaverage intelligence" as one that "substantially limits his or her ability to understand and process information, to communicate, to learn from experience or mistakes, to engage in logical reasoning, to control impulses, and to understand the reactions of others." (*Murphy v. State* (2002) 2002 Ok. Cr. 32, 54 P. 3d 556.) Utah requires that the defendant to meet the requirements of "significant subaverage intelligence" without further defining the term but also limits the claim to instances wherein "the state intends to introduce into evidence a confession by the defendant which is not supported by substantial evidence independent of the confession. (Utah Code Ann. 77-15a-101(2)(c).)

Thus, 22 states have recognized that the bare language of *Atkins*, without reference to a numerical cut-off[2] or a forensic language definition such as in *In re Ramon M.*, is not the way to proceed. Only nine states, Delaware, Georgia, Indiana, Louisiana, Missouri, Nevada, New Jersey, South Carolina, and South Dakota, have a fully-unadorned statute that neither has a cut-off definition nor attempts to import a forensic definition of mental retardation. The State of New York lists as a mitigating factor being "mentally retarded at the time of the crime, or the defendant's mental capacity was impaired or his ability to conform his conduct to the requirements of law was impaired, but not so impaired in either case as to constitute a defense to prosecution." (N.Y. Consol. Law., Crim. Proc., 400.27.9(b).) New York law additionally defines mentally retarded as "subaverage intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior." (N.Y. Consol. Law, Ment. Hyg., 1.03(21).) Respondent was not able to find where the other five states had addressed *Atkins* either by statute or case law.

Thus, despite the statements of *amici curiae* that respondent's position that a cut-off figure for qualification as being mentally retarded be adopted is bizarre and unheard of, it exists among many other states with respect to precisely this question. Their frantic pleas, instead, represent opposition to the idea that this Court will exercise its inherent power to save the statute from an unconstitutional instruction and adopt such an objective definition here. As the *Amici* frankly admit, they all, being defense counsel and medical organizations, to one extent or another, legitimately have a concern that capital punishment not be imposed on the mentally retarded. However, respondent is not blind to the fact that the most efficient way for them to accomplish that goal is to scuttle the mechanism for imposing the death penalty on anyone at all, mentally retarded or not. A statute that will not survive an equal protection challenge will suffice for that purpose.

Respondent will address the *Amici seriatim.*

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[2]Actually, *Atkins* itself suggested the cut-off of 70 by first noting that, "And it appears that even among those States that regularly execute offenders and that have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less than 70 since we decided Penry. n20 The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it." (*Atkins*, *supra*, 536 U.S. at 316.) Secondly, *Atkins* seemed to contain its own *In re Ramon M.*- type test which was adopted by the State of Oklahoma that "Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." (*Id*. at 318; see *Murphy v. State*, *supra*, 2002 Ok. Cr. 32.)

REPLY

HABEAS RESOURCE CENTER

Respondent will address this *Amicus*, that of the Habeas Resource Center (HRC), first in order due to the fact that, this *Amicus* argues what was not even asserted by Petitioner, i.e., on this record, this Court should find that Respondent has not entered an adequate "denial" of the allegations in the petition as is required by *People v. Duvall* (1995) 9 Cal. 4th 464. (HRC *Amicus* at 4-6.) The argument is as follows. When respondent "denied" that Petitioner was mentally retarded, that denial was not based on specific facts tending to prove such a lack of mental retardation, thus, under *Duvall*, this denial was insufficient meaning that the petition itself should be summarily granted.

Even ignoring that such a requirement would mean that a defendant would have to "provide facts tending to prove a negative," HRC argues that petitioner's counsel's denial of complete, unrestricted access to himself for purposes of examination did not excuse respondent's duty to provide such specific facts to support its denial in its answer. The HRC argues that such a refusal of unrestricted access for a mental examination was proper and that respondent should have gathered other non-medical facts to support the denial. Respondent's short answers are that 1) petitioner has no right to impose restrictions on access to his mental health where he has put it in issue, 2) *Duvall* does not require respondent to prove a negative, and 3) there was no need for respondent to gather non-medical facts showing petitioner was *not retarded* where those medical facts were provided by the petition itself.

Where a litigant has put his mental state in issue in litigation, he cannot then shield his opponent from access to such information. (*See Centeno v. Superior Court* (2004) 117 Cal. App. 4th 30, 40 [Any other result would 'give an unfair tactical advantage to defendants.'].) Certainly, he can request protective orders from the court and may retain some privacy as to certain parts. However, nothing in *Duvall* implies that given the short time to respond to an order to show cause, a respondent can thereby be "extorted," on pain of not having a sufficient basis for a denial, into accepting what limited access petitioner's counsel may deem appropriate for respondent to have.

In any event, as stated above, to require a respondent, who is technically a defendant in a habeas action, to plead facts proving a denial would be to turn jurisprudence topsy-turvy. The defendant would be charged with the responsibility of proving the lack of merit in plaintiff's case. This would mean that the defendant would be charged with "proving a negative." It would be great indeed, for plaintiffs, if they could simply make charges and obtain judgments granting relief where the defendant cannot marshal, in its answer, sufficient facts to prove the lack of worth of those charges.

The HRC argues that, at the very least, petitioner Hawthorne should be granted an evidentiary hearing. However, the HRC stated, with respect to the issue above as to the sufficiency of respondent's denial that "nothing prevented respondent's counsel from attempting to gather anecdotal evidence of adaptive function through lay witness interviews." (HRC *Amicus* at 5.) Of course, what this means, correspondingly, is that, by HRC's own admission, anecdotal evidence *is sufficient* upon which *to base a decision denying relief* as it is sufficient to

base a pleading denying the allegation of mental retardation. Here, the petition itself contains sufficient anecdotal evidence that would support a *summary denial* of the petition by this Court. In short, the petition itself contained anecdotal evidence *disproving* the allegation that petitioner is such a person who is so mentally retarded that a "national consensus" has evolved that it would be cruel and unusual punishment to inflict the death penalty upon him.

Attached to the petition, were the declarations of 1) Dale G. Watson, Ph. D., 2) Dr. Yvette Guerrero, Ph.D., and 3) George Woods, Jr. M.D., as well as a letter from Dr. Michael P. Maloney, Ph.D. As to the latter letter, written in 1983 at the time of trial in this case, initially, respondent would like to clear up a misconception that Dr. Maloney "tested" petitioner's full-scale I.Q. to be 71. He did no such thing. He stated that on "several performance (non verbal reasoning) *subtests* of the Wechsler Adult Intelligence Scale, he had an estimated I.Q. of approximately 71. As such, since the 71 figure is not a full scale I.Q. score, it is valueless.

A consideration of the latter also brings to mind another requirement implicit in *Atkins*, i.e., in order to be reliable, the disability must be documented as having existed prior to the necessity of producing such a diagnosis for forensic purposes. In fact, the statute governing the issue in the State of Colorado states that the "requirement for documentation may be excused by the court upon a finding that extraordinary circumstances exist." (Colo..Rev. Stat. §18-1.3-1101(2).)

Thus, another reason for summarily finding that the petition does not contain sufficient evidence that petitioner Hawthorne is a person described in *Atkins* that it provides no documentation of mental retardation *prior* to his commission of the death penalty offense wherein establishing that affliction would obviously be within his interests. The earliest evaluation provided is by Dr. Maloney and even that examination was performed when petitioner was in the death penalty dock on trial for his life.

However, as stated above, the anecdotal evidence all supports the conclusion that petitioner Hawthorne is not even close to being retarded, let alone one of the persons that is so retarded that about whom there is a national consensus that it would be cruel and unusual to execute. In Dr. Watson's declaration, there is anecdotal evidence that petitioner from an early age could 1) ride a mini-bike at high speeds (Decl. Watson, para. 35); 2) had vise grips which he used to repair his bikes and "only used guns when committing burglaries (*People. v. Hawthorne* (1992) 4 Cal. 4th 43, 53-54); 3) favorite sport was swimming (Decl. Watson, para. 35); 4) shined shoes for money when a child (Decl. Watson, para. 35); 5) shared money from shining shoes with family (Decl. Watson, para. 35); 6) noted by teacher to be good at following directions (Decl. Watson, para. 39); 7) drank 3 quarts a beer a week, sniffed glue, took angel dust and smoked "sherms" (PCP laced cigarettes) starting in the sixth grade and continuing (Decl. Watson, para. 39); 8) in his teens, he owned and drove a car, a 1972 Dark Green Impala that was "in the shop" on the day of the murders (RT 2288), such that often after his drug blackouts, he forgot where he parked it (Decl. Watson, para. 48); 9) fought abusive stepfather who molested sisters (Decl. Watson, para. 49); 10) made and brought his mother breakfast in bed, washed dishes, maintained the yard, performed household repairs, washed the car, and did "little handy things," (Decl. Watson, para. 50); 11) had a job and earned a paycheck, (Decl. Watson, para. 51) 12) when mother would run out of money, would take money earned from his job and would

sneak it into dresser drawer where mother kept her money and when she brought up the subject would advise her that she had probably "miscounted," ((Decl. Guerrero, para. 52); 13) learned to protect and defend himself in gang neighborhood by fighting, (Decl. Watson, para. 51); 14) Held fellow Blood gang member dying in his arms from gunshots that petitioner avoided, (Decl. Watson, para. 56); 15) his grades improved when he went to the CYA and received more concentrated education, (Decl. Watson, para. 64); 16) could do simple math, (Decl. Watson, para. 66); 17) read at the third grade level, (Decl. Watson, para. 67); 18) would clean and groom his mentally retarded older brother Ronnie (Decl. Guerrero, para.32); 19) showed guile by meeting people at door because he did not want them to see condition of the house, (Decl. Guerrero, para. 33); 20) would "mumble" and often had to be told to "speak up," (Decl. Guerrero, para. 35); 21) sister said of him that he would "wash my car for me, try to scrub the tires, just do little handy things that I couldn't do myself," (Decl. Guerrero, para. 53); 22) protected younger brother Tyrone "on the streets" and sister Saundra, loaned them money and took her out to eat and see a movie, (Decl. Guerrero, para. 54); 23) as to his older brother Ronnie, who used to be a compulsive cleaner but fell mentally ill and wandered the streets delusional, petitioner "cut Ronnie's hair, trimmed his beards and bought him clothes 'so that you wouldn't know there was anything wrong with [Ronnie] to look at him until he started to talk.' He would track him down in Compton on the streets, take him home and make sure he did not drink. He said that people thought Ronnie was 'a bum or a drunk on the street, because he roamed the neighborhood.' But, Anderson said, people would not "mess with" Ronnie because they knew [petitioner] was taking care of him. As with his sister Chevaughn's death, Anderson blamed himself for Ronnie's mental illness although no facts supported this conclusion. Nevertheless, Anderson believes that if he 'had been the oldest then Ronnie wouldn't have ended up crazy." (Decl. Guerrero, para. 56) 24) committed burglaries and robberies and served time in the youth authority and a two year stint in prison (Decl. Guerrero, para. 57) and admitted being a clearing house for drugs and guns for his gang (RT 2307); 25) became "paranoid" on drug use and accused friends of taking his drugs, (Decl. Guerrero, para. 65); 26) was diagnosed as having "learning disabilities," in the second grade, which accounts for his poor academic performance, (Decl. Guerrero, para. 76), and 27) maintained and care for his dogs until step-father drove them off, (Decl. Guerrero, para. 70.)

These are but a few of the facts included in the petition itself that contradict petitioner's assertion that he is mentally retarded. Out of HRC's own pleading they have established that they are sufficient facts upon which this Court can find that petitioner has failed to establish that he is mentally retarded as contemplated by *Atkins*. In addition, petitioner testified at trial that he was not only a gang member but a "shot-caller," in the gang, a term for a leader, one who "calls the shots" as to what will occur. (RT 2307.)

As for the rest of the *Amicus* brief filed by the HRC, it argues, despite the fact that California Penal Code section 1376 was enacted in 2003, that it should not be disturbed because it is "settled." (HRC *Amicus* at 2-3.) It argues that for "two decades, both Penal Code section 1001.20(a), which governs diversion of mentally retarded defendants, and Welfare Institutions Code section 6500, which governs involuntary commitment of mentally retarded people . . . have used definitions that are nearly identical to Penal Code section 1376(a) . . .." However, the question that suggests itself is, "So what?"

This Court is deciding only the question of mental retardation as it relates to the imposition of capital punishment. Before is neither funding for mental retardation, admittance of persons into state mental institutions or even any criminal issues relating to mental retardation such as competency to stand trial or diversion. Since only the definition of mental retardation for purposes of imposing the death penalty is involved, there is no issue as to any variance with the definition of mental retardation for any other purpose.

PROTECTION & ADVOCACY, INC.

Amicus for the Protection & Advocacy, Inc. (P&A) first error when they assert that, "As with any other medical or psychiatric condition, courts must defer to clinical professionals and current clinical standards to define the term mental retardation." (P&A *Amicus* at 4.) This is not true here and has not been true with other conditions such as insanity or disability. Instead, courts have adopted a forensic, i.e., legal, definition of that medical condition. Medical insanity and legal insanity are two different matters, so too should there be a legal definition of mental retardation for *Atkins* purposes as well as a medical one for whatever other purposes. Legal definitions often do not and need not mirror medical definitions of mental illness. (*See Kansas v. Hendricks* (1997) 521 U.S. 346, 357-361.)

Amicus next points out that the scientific and medical community has "rejected a threshold IQ requirement of < 70 in defining mental retardation. (P&A *Amicus* at 4-5.) And well they may. Again, the purposes for which the scientific and medical community might want to utilize the definition of mental retardation have nothing to do with the definition of mental retardation for purposes of the Eight Amendment to the United States Constitution, the concern in *Atkins*. The argument (P&A *Amicus* at 5) that adopting a 70 or below cut-off here "will embolden lower courts and governmental agencies to deny services and program eligibility to numbers of persons with IQs between 70 and 75 who desperately need them, is not only speculation but poorly grounded speculation. If anything, one, transparently, has nothing to do with the other.

Next, *Amicus* points out that the definition of mental retardation has undergone numerous changes from 1908 to 2002 when the American Association of Mental Retardation modified it to "a disability characterized by significant limitations in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills." (P&A *Amicus* at 6-7.) Presumably, this recitation of history is included to make the point that the definition of mental retardation owes no allegiance to the IQ numbers of 70 and below as it owes to any other set of changing numbers. However, in the forensic area, where a standard must be in place to fairly distinguish between one set of applicants and another, that standard cannot be *ever-changing*. It is unquestionably unfair to allow a person to be executed or exempted under a standard which the scientific and medical community, by vote of professionals in those fields, might change in a short amount of time. In short, *Amicus*' argument supports, rather than undermines, respondent's position.

Next, *Amicus* even acknowledges that the Diagnostic and Statistical Manual (DSM), in its latest addition, contains the language, uncomfortable for its position that "significantly subaverage intellectual functioning is defined as an IQ or about 70 or below." It

argues, however, that given a measurement error of approximately 5 points, it is possible to diagnose mental retardation in individuals with IQs of 71 through 75. (P&A *Amicus* at 8.) However, *Amicus* here has argued against *any* cut-off and recognizing a swing of error is not the same as banning all cut-offs.

The rest of the *Amicus* brief in this case is solely devoted to the unrealistic and unwarranted assumption that the definition of mental retardation urged to be established as a bar to execution will be imported in other areas of the law, particularly civil. As respondent has indicated, respondent does not seek such here and would consider it, in fact, odd if this Court were to diverge from its specific task here to affect those areas of law.

AMERICAN ASSOCIATION ON MENTAL RETARDATION

The *Amicus* of the American Association on Mental Retardation (AAMR) first largely restates the definition of mental retardation, and its elements, widely agreed upon. (AAMR *Amicus* at 1-7.) What is not at issue is any attempt by respondent to change or dispense with those elements but to supplement them. To that end, in a footnote, AAMR attacks respondent by indicating that the literature has "no support for the Attorney General's suggestion that the . . . protection of *Atkins* applies only to individuals who score below 60 on IQ tests. . ..It is clear from *Atkins* that the Eighth Amendment protection encompasses *all* individuals who have mental retardation. [*Citation*]." (AAMR *Amicus* at 7, fn. 4; emphasis added.)

First of all, respondent merely indicated, in its return, that there could be an argument for interpreting *Atkins* as applying only to the moderately or severely retarded. This is supported by *Atkins* itself wherein the claimant there had an IQ of 59. Respondent argues here, that the cut-off be, at least, 70 or below.

Secondly, *Amicus* walks unsettled ground when they assert that *Atkins* protects *all* those who can be classified as mentally retarded. Such an assertion is not supported by a reading of *Atkins*. Instead, *Atkins* prohibits execution of those, who by virtue of their retardation, are so limited that there exists a "national consensus" about executing them. As shown above, *Atkins*, in this context, only specifically mentioned those with IQs below 70.

Next, AAMR makes the direct statement that "it is not possible to identify a single, arbitrary IQ score as the upper boundary." (AAMR *Amicus* at 7.) This is an honest but breathtaking admission on the part of *Amicus*. It openly states that IQ rating is, functionally, irrelevant. Following AAMR's logic, even the language "significantly subaverage intelligence" should be ignored since the mentally retarded might even possess an IQ of 140. As such, *Amicus* urges this Court to interpret the statute in a more significantly variant way than does respondent. In short, *Amicus* solicits this Court to open to doors of the mental retardation exemption to persons of all I.Q. ratings. Obviously, this invitation should be rejected.

Next, AAMR, in furtherance of its argument that the cut-off number of an IQ of 70 or below not be over-emphasized, argues that some will an IQ below that number might have no significant deficits or impairments in adaptive functions while such might exist among others with higher IQs. However, respondent has not suggested dispensing with either the adaptive impairment or manifestation or documentation elements of the tests for mental retardation. Respondent has merely argued its interpretation of the term "significant sub-average intellectual functioning."

As for the existence of someone with an IQ of 71 or above, but had such severe adaptive malfunctioning that the person could not live an independent life, this Court would no doubt view with suspicion, the absence of a jury finding that mitigation did not weigh aggravation in such a case. Nonetheless, even *Atkins* did not find that there was a "national consensus" against executing such persons when their IQ was 71 or above.

Next, AAMR goes on to argue that a flexible system wherein doctors engage in a battle as to the applicability of the definition of mental retardation should be preferred. (AAMR *Amicus* at 9-11.) *Amicus* offers the apologetic that, "This does not mean that the determination . . . is somehow indeterminate or unmanageable, nor does it mean that the boundary is subject to manipulation. . . As in any case. . . courts will be able to reach a judgment about whether the defendant's intellectual limitations falls within statutory or constitutional protections."

However, respondent recognizes that medical testimony will be necessary and no attempt here is made to dispense with it. What respondent pleads for here is a forensic guide by which to judge medical evidence. What petitioner and *Amici* seek is a standard solely based on scientific and medical evidence not distilled through any legal or forensic prism and totally without objective boundaries.

Next of note, *Amicus* makes the dangerous request that this Court not lay down a firm documentation requirement concerning the manifestation of the disability prior to the age of 18. *Amicus* attempts to distinguish this from other states that have language requiring manifestation "during the developmental period." (AAMR *Amicus* at 14-15.) The import of the argument of *Amicus* in this respect is unclear.

If *Amicus* is noting that other states require the deficits to have manifested at the ages of birth through childhood whereas California only requires manifestation prior to age 18, this is a fact. However, although it does not appear likely *Amicus* is arguing such, if *Amicus* is maintaining that there need exist no documentation *of* the disability's existence *prior* to age 18 and that it would suffice for a defendant to only rely on forensic evaluations *after* the commission of the crime (as petitioner has here), then respondent asserts that *Amicus* is wrong.

It is clear that, even under Penal Code section 1376(a) as written, the disability relied upon must be capable of being documented as having existed prior to the age of 18. If professionals can, by use of school records and other *neutral* reliable sources, prove that such disabilities pre-existed prior to the age of 18, the statute would be satisfied. However, unlike suggested by *Amicus* statements of family and friends who might have a motive to falsify history would not satisfy the "manifestation" requirement of Penal Code section 1376(a).

The rest of the *Amicus* brief of AAMR indicates that clinicians in the field routinely evaluate questions of mental retardation and that this issue is separate from competency to stand trial. (AAMR *Amicus* at 15-18.) Obviously, respondent's point is that the fact-finder have some objective and forensic guide by which to evaluate the output from medical and scientific professionals and recognizes that this issue is separate from competency to stand trial.

CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

Lastly, respondent addresses the *amicus* brief filed by the California Attorneys for Criminal Justice (CACJ). *Amicus* first points out that accepting respondent's argument would be to create one rule for pre-conviction cases and one-rule for post-conviction cases. (CACJ *Amicus* at 5-6.) This is not true. Respondent is urging that Penal Code section 1376(a) be

interpreted to include such a requirement and that that interpretation be binding in cases tried anew under that provision.

Next, *Amicus* argues that "California has consistently" defined mental retardation in a way that does not contain a cut-off or a bright-line and wonders at respondent's suggestion. (CACJ *Amicus* at 6-7.) However in the case of *People v. Smithey* (1999) 20 Cal. 4th 936, which was decided after *Penry v. Lynbaugh* (1989) 492 U.S. 302, and prior to *Atkins*, the defendant there claimed to be mentally retarded and therefore exempt from execution because, according to him, circumstances had changed to the extent that there was an evolving national consensus against executing the mentally retarded. Disposing of the claim however, this Court held:

> We need not decide that issue in the present case, however, because the record does not establish that defendant falls within the class of mentally retarded individuals who would be exempt from the death penalty under the statutes of other states. Indiana law, for example, requires clear and convincing proof of both significantly subaverage intellectual functioning and substantial impairment of "adaptive behavior," which refers to how well an individual deals with the demands of everyday life compared with other individuals with similar educational and social backgrounds. Thus, an individual with an IQ of 69 to 72, chronic alcoholism and drug abuse, and possible brain disturbances, who nevertheless lived in the community, worked, operated an automobile, had social relationships with others, and could meet his own immediate needs, was found not to be mentally retarded within the meaning of the applicable statutory provision. *(Rogers v. State*, *supra*, 698 N.E.2d atpp. 1176-1180; see also *Rankin v. State* (1997) 329 Ark. 379 [948 S.W.2d397, 402-404] [sustaining a trial court finding that the defendant was not mentally retarded where he had an IQ between 66 and 72 but was able to communicate, sustain relationships, and take care of his personal needs]; Ga. Code Ann. § 17-7-131, subds. (a)(3), (c)(3), (j) [requiring the trier of fact to find beyond a reasonable doubt "significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior" before a defendant may avoid execution on the ground of mental retardation].)
>
> Defense experts testified that defendant has an IQ of approximately 70 and is mildly mentally retarded. His ability to interpret events around him and respond in appropriate ways is considerably below average. Defendant has extremely poor judgment and internal controls, with limited coping skills, and he needs external controls to function adequately in society. Defendant's school records indicate that when he was 13 years of age, a psychologist concluded he was mentally retarded and had a mental age of 7 years. On the other hand, the prosecution's expert

> attacked the reliability of the tests used by defense experts, and disagreed with the opinion that defendant is mentally retarded. The prosecutor also challenged the reliability of the conclusions reflected in defendant's school records. Moreover, although defendant has had obvious difficulty abiding by the law and functioning successfully in society, the evidence at trial, including his own testimony, indicated that he could communicate, take care of immediate personal needs, perform skilled labor, earn money, form friendships, drive and repair automobiles, and adapt well to living and working in prison. In ruling upon the automatic motion for modification of the penalty, the trial court stated that defendant's "low mentality" *was being overly stressed*: "[H]e's exhibited his ability to be a plumber, to be an electrician, to be a mechanic. He builds models that were presented here to the Court that were very well done. So his mentality is not that of retardation. He made a good witness on the stand and talked good [sic]. He didn't exhibit any of what we ordinarily consider signs of retardation. The fact that he was real good in prison . . . shows that he understands the rules and regulations. He can follow rules and regulations." (Italics added.) The court subsequently found that defendant had no mental disease or defect: "The I.Q. was low, but in all other aspects he [had] the ability to understand, not to do things and to conduct himself without any problem."
>
> Viewing the conflicting evidence in the light most favorable to the judgment (*People v. Davis*, *supra*, 10 Cal. 4th 463, 509), we determine that defendant is not mentally retarded within the meaning of other states' laws exempting mentally retarded individuals from the death penalty. Therefore, assuming, for the sake of argument only, that the Eighth Amendment precludes execution of the mentally retarded, it does not render defendant's sentence invalid.

(*Id.* at 1014-1015.)

Here, contrary to the assertion of *Amicus*, this Court performed a pre-*Atkins* analysis that was faithful to *Atkins* and were not impressed by an I.Q. score of 66-69, presented by a person who, arguably, has made a much better case for retardation as has petitioner here.

Next, *Amicus* makes the same argument addressed above wherein it is pointed out that the IQ quotients designating retardation have evolved and changed in the scientific community. (CACJ *Amicus* at 7-9.) However, as pointed out above, in a forensic context these definitions cannot change as, with respect to constitutional as opposed to statutory concerns, all persons must be subjected to the same guidelines.

Lastly, *Amicus* takes the outrageous position, that Penal Code section 1376(a) need not be utilized even as "fully incorporating" even this question as it respects "post-conviction litigation" but only that it serve as only a guideline "outlining some procedures which may be of use in post-conviction litigation." The meaning is clear. CACJ *Amicus* even believes that the definitions in Penal Code section 1376(a) are too restrictive and should not truly be binding so as to prohibit it from arguing that its future clients not fitting, even arguably, that imprecise definition, nonetheless come under it. In sum, CACJ invites this Court to openly gut the law or, at best, CACJ is inviting this Court to create an opening in which it and other organizations will ultimately use to undermine this portion of the death penalty statute, and ultimately, thereby, enforce of the death penalty law.

Quite simply, the suggestion of *Amicus* should be soundly rejected.